

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTIAGO PENA RAMIREZ,

Defendant and Appellant.

2d Crim. No. B190585  
(Super. Ct. No. 2005020455)  
(Ventura County)

Santiago Pena Ramirez appeals a judgment following conviction of assault with a deadly weapon and assault. (Pen. Code, §§ 245, subd. (a)(1) & 240.)<sup>1</sup> We affirm.

**FACTS AND PROCEDURAL HISTORY**

Patricio Vega and defendant Ramirez lived in separate apartments in a Port Hueneme apartment building located on Jane Drive. In the late afternoon of June 18, 2005, Vega walked to apartment number two to borrow a cooking utensil from his cousin. As he approached the apartment, Ramirez "came at [him] with a knife." Ramirez stabbed Vega in the left forearm as Vega tried to protect himself. Vega's arm bled profusely and he ran toward his cousin's apartment. Ramirez pursued him, shouting "Wait, son of a bitch." Vega ran inside and locked the apartment door.

---

<sup>1</sup> All statutory references are to the Penal Code.

Port Hueneme Police Officer Paul Gomez soon arrived. He saw Ramirez holding a knife and standing at the door of his apartment, number four. As Gomez arrested Ramirez, he noticed blood on Ramirez's right wrist and hand. Gomez found a kitchen knife on the living room floor of Ramirez's apartment.

That same afternoon, Port Hueneme Police Officer Elida Mendoza found a man who was suffering from a fresh head wound inside apartment number two of the Jane Drive apartment building. She took photographs of his injuries and authenticated the photographs at trial. The trial court admitted the photographs into evidence. The victim did not testify at either the preliminary examination or at trial.

That evening, Port Hueneme Police Officer Baltazar Tapia interviewed Ramirez in a tape-recorded interview. Ramirez admitted striking a man with a beer bottle near apartment number two. He then returned to his apartment and obtained a knife. Ramirez stabbed Vega with the knife because he was angry that Vega had laughed at him. He admitted chasing Vega afterwards.

At trial, Ramirez testified that he threw an unopened beer bottle at a man who insulted his daughter's bicycle. He saw the bottle strike the man in the head.

Ramirez also testified that he returned to his apartment and was using a kitchen knife to slice lemons. He heard loud knocks on his apartment door and opened it. There were three men, one of whom held a baseball bat. As he backed away, he felt someone behind him. When he "turned in a hurry," he accidentally cut the man standing behind him: "I turned in a hurry. . . . A person was very close to me, and I cut him." Ramirez stated that he then ran because the three men were chasing him. He stated that he was "drunk" when interviewed by Officer Tapia.

The jury convicted Ramirez of assault with a deadly weapon (count 1, victim Vega) and assault (count 2, unnamed victim). It found the allegation of great bodily injury regarding count 1 untrue. The trial court sentenced Ramirez to a three-year mid-term sentence for count 1, and to 180 days confinement in county jail for count 2. It awarded Ramirez 63 days of precustody credit, and it also imposed \$400 fines pursuant to sections 1202.4, subdivision (b), and 1202.45.

Ramirez appeals and contends that: 1) the prosecutor presented a correct and an incorrect legal theory regarding the element of intent; 2) the trial court erred by not correcting the prosecutor's incorrect legal theory or by not instructing that negligence cannot satisfy the mental state for assault; 3) he did not receive the effective assistance of counsel because his attorney did not object to the prosecutor's incorrect legal theory; and 4) the trial court erred by denying his motion for judgment of acquittal regarding count 2, the assault committed with the beer bottle.

## DISCUSSION

### I.

Ramirez argues that during summation, the prosecutor argued a correct and an incorrect legal theory regarding intent and assault with a deadly weapon (knife). He points out that he testified at trial that he accidentally struck Vega with the knife when he "turned in a hurry," and that he did not intend to assault him. Ramirez asserts that the prosecutor essentially argued that "negligence" in turning into the victim satisfied the element of intent: "In Count 1, did he, of his own volition, decide to turn with the knife? The answer is yes. Nobody made him do it. Nobody physically forced him to do it. He says he turned of his own volition." "In order for something to be a legal accident, it requires that . . . – the volitional quality of the act not exist. A legal accident means that the defendant did not move by choice. It means that something else caused him to move."

Ramirez contends that the error is not harmless beyond a reasonable doubt because we cannot determine whether the jury relied upon the prosecutor's "legally incorrect" theory. (*People v. Green* (1980) 27 Cal.3d 1, overruled on other points by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 239; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [error to present legally adequate and legally inadequate theory of crime]; *People v. Lara* (1996) 44 Cal.App.4th 102, 110-111 [trial court erred by instructing upon criminal negligence as alternative theory of committing battery, a general intent crime].) He points out that the jury requested

reinstruction regarding the legal meaning of "accident," "intent," "willful," and "act," as well as a transcript of summation.

For several reasons, there is no error.

First, the prosecutor did not argue nor did the trial court instruct concerning criminal negligence. The prosecutor argued and the trial court properly instructed regarding the general intent required for the crime of assault with a deadly weapon. (CALCRIM 875.) We do not interpret the prosecutor's summation as arguing that negligence suffices as the requisite mental state for assault with a deadly weapon. Arguably, the prosecutor did not completely discuss the law and its application to the facts here regarding "accident."

Moreover, Ramirez did not object. 0 "When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he . . . is obliged to call them to the court's attention by a timely objection." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.) Ramirez thus has waived any claim of misconduct. (*Id.*, at p. 44.)

Second, the prosecutor did not commit misconduct. (*People v. Morales, supra*, 25 Cal.4th 34, 47 [not misconduct for prosecutor to discuss only certain elements of a crime during summation].) His conduct did not render the trial fundamentally unfair nor did it involve deceptive or reprehensible methods to persuade. (*Id.*, at p. 44 [discussing federal and state standards to test asserted prosecutorial misconduct].) During summation, a party may discuss the evidence and comment on reasonable inferences to be drawn therefrom. (*Ibid.*) There is no reasonable likelihood the jury construed or applied any of the arguments challenged here in an objectionable fashion. (*Ibid.*) Moreover, we presume that the jury relied upon the trial court's instructions, and not prosecutorial argument, in convicting Ramirez. (*Id.*, at p. 47.) We note that the trial court instructed with CALCRIM 200, instructing that the trial court's instructions govern, not the attorneys' arguments concerning the instructions.

Third, the rule of *People v. Green, supra*, 27 Cal. 3d 1, and its progeny, does not apply based solely upon improper prosecutorial remarks. (*People v. Morales, supra*, 25 Cal.4th 34, 48 [dictum].) "Properly understood, *Green* reasons that in cases

suffering from insufficient evidence, deficient instructions, or other errors made in presenting evidence or giving instructions, ill-advised remarks by the prosecutor may compound the trial's defects." (*Id.*, p. 48.)

## II.

Ramirez contends that the trial court erred by not instructing sua sponte that negligence cannot satisfy the mental state for assault. Alternatively, he argues that the trial court erred by not clarifying the nature of the requisite mental state when it responded to the jury questions. Ramirez asserts that without additional instructions, the jury was unaware that negligent conduct could support an accident defense. He contends that the errors denied him due process of law and are not harmless beyond a reasonable doubt.

The trial court did not err because the prosecutor's summation did not present an incorrect legal theory (I., *ante.*). Moreover, the jury received proper instructions concerning assault with a deadly weapon, intent, and accident. In particular, the trial court instructed that assault required that defendant act willfully and that when he acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone. (CALCRIM 875; *People v. Williams* (2001) 26 Cal.4th 779, 787-788 [assault requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another].) If Ramirez believed that this pattern instruction was unclear, settled law requires that he request a clarifying instruction. (*People v. Ramirez* (2006) 39 Cal.4th 398, 469.)

We also do not interpret the jury's request for photocopies of the instructions, copies of the summation transcript, and definitions of the elements of assault with a deadly weapon, as indication that jurors necessarily were confused. The jury requests reveal a careful and conscientious deliberation regarding guilt.

### III.

Ramirez asserts that his attorney rendered ineffective assistance of counsel by not objecting to the prosecutor's incorrect legal theory concerning intent.

As discussed herein, the prosecutor did not present an incorrect legal theory. The trial court correctly instructed the jury concerning the mental state required for assault with a deadly weapon and the defense of accident. It also instructed that the court's instructions governed, and not the instructions as argued by counsel. Ramirez has not established that his attorney's performance fell below prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

### IV.

Ramirez argues that the trial court erred by denying his motion for judgment of acquittal on count II, pursuant to section 1118.1, because he contends that the prosecutor did not establish the corpus delicti of assault.

Section 1118.1 authorizes the trial court to enter a judgment of acquittal "if the evidence then before the court is insufficient to sustain a conviction . . . on appeal." In deciding a motion for judgment of acquittal, the trial court applies the standard of review applied by the reviewing court in assessing the sufficiency of evidence to support a conviction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) When a defendant moves for a judgment pursuant to section 1118.1 at the close of the prosecution case, "the sufficiency of the evidence is tested as it stood at that point." (*Id.*, at p. 1213.) The reviewing court independently reviews the trial court's ruling pursuant to section 1118.1. (*Ibid.*)

The corpus delicti rule requires that the prosecution establish the corpus delicti of the offense independently of the defendant's extrajudicial statements. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1127.) The elements of the corpus delicti are 1) the injury, loss, or harm, and 2) the criminal agency that has caused the injury, loss, or harm. (*Ibid.*) The independent proof may be by circumstantial evidence, and it need not be

proof beyond a reasonable doubt. (*Ibid.*) A slight showing that permits the reasonable inference that a crime was committed is sufficient. (*Id.*, at pp. 1127-1128.)

Here the prosecutor established the corpus delicti of assault independently of Ramirez's extrajudicial statements or in-court testimony. Police Officer Mendoza testified that she responded to a call for service on June 18, 2005, at apartment number two in the Jane Drive apartment building. In the center courtyard, she "contact[ed]" a man with a recent head wound on the back of his head. The wound was red and contained a small amount of blood. She took photographs of the injury and the trial court admitted the photographs into evidence. The photographs and Officer Mendoza's testimony establish the element of injury or harm. We also draw the reasonable inference that the victim's injury was caused by the criminal act of another and not by accident, because Officer Mendoza testified that she was summoned to apartment number two and "contact[ed]" the victim in the courtyard. The act of summoning a police officer to investigate and take photographs of a fresh injury allows a reasonable inference that the injury was caused by criminal means. (*People v. Gutierrez, supra*, 28 Cal.4th 1083, 1127-1128 [corpus delicti may be shown by slight or modest evidence].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Roland Purnell, Judge  
Superior Court County of Ventura

---

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.